TAN KOH KENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Adams J.) December 10, 1961]

[J.B. — Criminal Appeal No. 31 of 1961]

Rubber Dealers Enactment (Johore Laws, Enactment No. 65) — Licence holder charged with purchasing rubber without any written authority being delivered to him by the vendor for sale of rubber — Duty of prosecution to prove that accused was licensed rubber dealer.

Evidence — Onus of proof — How this may be discharged — Evidence Ordinance, 1950, s.106.

Appeal — Evidence — Additional evidence — Principles on which the appellate Court will act in exercising its discretion whether to allow additional evidence to be called — Criminal Procedure Code, (Cap. 6), s.317.

Where the charge alleges that the appellant being a licensed rubber dealer had purchased rubber without any written authority being delivered to him by the vendor for the sale thereof, the prosecution must prove *inter alia* that the appellant was a licensed rubber dealer. *Reg.* v. *Khoo Guan Teik* (1) followed.

The principles on which the appellate Court will exercise its discretion to allow additional evidence under section 317 of the Criminal Procedure Code, (Cap. 6) are: First, the evidence that is sought to be called must be evidence which was not available at the trial. Secondly, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief. *R.* v. *Parks* (2) followed.

Cases referred to:—

(1) *Reg.* v. *Khoo Guan Teik*, [1957] M.L.J. 128.

(2) *R.* v. *Parks*, [1961] 1 W.L.R. 1486; [1961] 3 All E.R. 633.

MAGISTRATE'S CRIMINAL APPEAL.

F. Keith Sellar for the appellant.

Raja Azlan Shah (Legal Adviser, Johore) for the respondent.

Cur. Adv. Vult.

Adams J.: This is an appeal from the decision of the Circuit Magistrate, Tuan Syed Hussein Jamallulil, convicting the appellant for an offence contrary to section 13 of the Rubber Dealers Enactment (Johore Laws 65/35). Mr. Sellar appeared for the appellant and made one point. He argued that as the charge alleged that the appellant being a licensed rubber dealer had purchased 34 katties of rubber without any written authority being delivered to him by the vendor for the sale of the said rubber, the prosecution must prove *inter alia* that the appellant was a licensed rubber dealer, and this they had failed to do. He cited the judgment of Rigby J. in the case of *Reg.* v. *Khoo Guan Teik* (1). This case is on all fours with the present one and I need cite only one passage:—

"The gravamen of all these offences was that the respondent, being a duly licensed rubber purchaser, failed to comply with the statutory requirements imposed upon the holder of any such licence. It was, therefore, essential for the prosecution to prove that he was the holder of such a licence. The case is entirely different from that class of case where a person is charged with doing an act without being the holder of a valid licence empowering him to do that act, e.g., driving a motor car without a valid licence. In that class of case, since it is peculiarly within the knowledge of the person charged as to whether he has the requisite licence or authority empowering him to do the act that forms the subject matter of the charge, the law casts the burden of proving the fact — of producing that requisite licence or authority — upon him. Put in another way, where an offence consists in doing an act without lawful authority, it is not necessary for the prosecution to prove the negative averment of absence of authority; the onus is on the defence to prove that such authority existed. This is recognised by section 106 of the Evidence Ordinance. But this case is really the converse of that rule. There was no question here of proving a negative averment. The case for the prosecution was the positive averment that whilst he was the holder of a licence specifically issued to him, he did certain acts in breach of that licence. It was clearly an essential preliminary part of the case for the prosecution to prove that he was, in fact, the holder of the said licence. This could, and should, have been done in one of two ways, either by production of the original licence, or by serving upon the respondent, in accordance with the provisions of section 66 of the Evidence Ordinance, a notice to produce the original document. If, and only if, the respondent had failed to comply with the notice to produce the original document, could secondary evidence as to the contents of that document become admissible. In the absence of the proper production of the licence, or admissible secondary evidence as to its contents, there was, therefore, no evidence before the learned Magistrate that the respondent was a person licensed under the Enactment and the learned Magistrate, in my view, acted perfectly properly in dismissing the charges."

With that statement of the law I respectfully concur. The learned Deputy Public Prosecutor does not support the conviction in this case.

The only question is whether I should exercise the powers conferred on me by section 317 of the Criminal Procedure Code and direct that further evidence be taken. The evidence that is missing from the record is relevant to the issues and it is credible and well capable of belief. But it was available to the prosecution at the time of the trial and was only omitted no doubt owing to the inexperience of the prosecuting officer who is stated to be a woman Inspector Bim. I am afraid that the inexperience of prosecuting officers resulting in mistakes and omissions in the evidence for the prosecution is not a good ground for calling further evidence (see *Mallal's* Criminal Procedure, 4th Edn., p. 471). This matter was also considered by Parker L.C.J. in *R.* v. *Parks* (2), which was a case in the Court of Criminal Appeal of the United Kingdom. I do not think I can do better than follow the principles laid down in that case that the fresh evidence to be admitted must:

(a) not have been available at the trial,

(b) be relevant to the issues,

(c) be credible and well capable of belief.

I do not therefore consider that I should exercise the powers conferred upon the Court by section 317 since this evidence was available to the prosecution at the time of the trial.

The appeal must be allowed, the conviction quashed and the fine if paid must be refunded to the appellant.

Appeal allowed.